No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLANTS,

v.

THE ALTON RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Eastern District of Michigan, Southern Division

CIVIL ACTION NO. 1323

THE ALTON RAILROAD COMPANY, ET AL.,
PLAINTIFFS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, DEFENDANTS

JURISDICTIONAL STATEMENT BY THE DEFENDANT-CROSS-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

(Filed June 6, 1941)

The defendant-cross-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon these defendants' cross-appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed:

A. STATUTORY PROVISIONS

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, Section 210, 36 Stat. 1150; as amended

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by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38, Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

B. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED

The decree sought to be reviewed was entered on April 7, 1941. The petition for cross-appeal was presented on May —, 1941, by these defendants, together with an assignment of errors.

C. NATURE OF CAUSE AND RULINGS BELOW

This is a cross-appeal from a decree of the District Court of the United States for the Eastern

District of Michigan, Southern Division, entered April 7, 1941, and from the portion thereof which grants in part plaintiffs' complaint and which sets aside and annuls that portion of the Commission's report in the proceeding hereinafter described which authorizes operations by defendant John P. Fleming from Detroit, Mich., to points within the State of Arkansas, said decree having been made in a suit brought by the above-named plaintiffs under and pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28, U. S. C.

The plaintiffs' complaint prayed that the said District Court enjoin, set aside, and annul an order of the Interstate Commerce Commission entered September 19, 1938, in proceedings entitled *John P. Fleming Common Carrier Application*, No. MC-48654 (reported 8 M. C. C. 469), in which report and order the Commission found that said applicant had established his right to a certificate to operate as a common carrier under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935. The complaint filed in the District Court alleged, among other things, that the Commission's said order was erroneous in law and that in the light of the facts shown in evidence before the Commission that plaintiff was and is entitled to have no certificate whatever issued under and in pursuance to the "grandfather" provisions of said Act, and that by reason of the Commission's

said report and order the plaintiffs would suffer great and irreparable injury to their business.

The case was heard upon the merits before a Court composed of three judges organized pursuant to U. S. C., Title 28, Section 47 (the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220). The defendants, the United States, the Interstate Commerce Commission, and John P. Fleming, in their answers raised the issue that the plaintiffs were without standing to institute and maintain said suit to set aside the Commission's report and order and also the issue that the Commission's report and order were within the Commission's jurisdiction in accordance with law, supported by substantial evidence and in all respects lawful. A transcript of all the evidence received before the Commission, duly certified by its Secretary, was received in evidence. Thereafter, on April 7, 1941, the Court handed down its opinion and entered its decree holding that the prayer of the complaint should be granted to the extent of excluding from the Commission's report and order issued in said proceeding the authority therein granted to defendant John P. Fleming to transport property from Detroit, Mich., on the one hand, to any point in the State of Arkansas, on the other hand, and further holding that the defendant John P. Fleming be permanently enjoined from so operating under the authority of said report and order. In all other

respects said report and order were sustained and the relief asked in plaintiffs' complaint was denied.

The plaintiffs have taken their appeal from the portion of the Court's decree which sustains the Commission's report and order and defendants have taken a cross-appeal from the portion of the Court's decree which modifies and annuls the Commission's report and order relative to operations in Arkansas as aforesaid and enjoins Defendant Fleming from so operating thereunder.

The questions presented by this appeal are substantial. They involve the question of the standing of the plaintiffs which are steam railroads transporting automobiles in railway cars to bring suit to set aside the report and order of the Commission under which defendant Fleming would transport automobiles by the so-called "driveaway" method, and the question of whether the plaintiffs have any interest in the order of the Commission by virtue of any actual or substantial competition between the two forms of transportation. The questions also involve the duties and functions of the District Court with regard to the weighing of the evidence heard by the Interstate Commerce Commission in proceedings based upon applications for certificates of convenience and necessity for common carriers under the so-called "grandfather" clause of Section 206 of the Motor Carrier Act, 1935, and the validity of the action of the Commission in granting such application.

D. CASES SUSTAINING THE SUPREME COURT'S JURISDICTION ON APPEAL

Hines, Trustees, v. *United States,* 263 U. S. 143.

Piedmont & Northern R. Co. v. *United States,* 280 U. S. 469.

Sprunt & Son v. *United States,* 281 U. S. 249.

Pittsburgh & W. Va. Ry. v. *United States,* 281 U. S. 479.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.,* 294 U. S. 499.

United States v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454.

Florida v. *United States,* 282 U. S. 194.

Beaumont, Sour Lake & Western Ry. Co. v. *United States,* 282 U. S. 74.

Ann Arbor Railroad Co. v. *United States,* 281 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1.

Interstate Commerce Commission v. *Union Pacific Ry. Co.,* 222 U. S. 541.

United States v. *Maher,* 307 U. S. 148.

E. DECREE AND OPINION OF THE DISTRICT COURT

Appended to this statement is a copy of the opinion of the District Court which, the Court states, includes its findings of fact and conclusions of law, and a copy of the decree of said Court sought in this cross-appeal to be reviewed in part.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the cross-appeal.

Dated June 6th, 1941.

Respectfully submitted.

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Solicitor General,

THURMAN ARNOLD,
Assistant Attorney General,

JOHN C. LEHR,
United States Attorney,

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Special Assistant to the Attorney General.
For the United States of America.

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For the Interstate Commerce Commission.

GEORGE S. DIXON,
Attorney for John P. Fleming.

(Copy of judgment and decree and copy of opinion of court on petition to enjoin and set aside an order of the Interstate Commerce Commission appear in record on direct appeal.)

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